SYED ABDULLAH AL-SHATIRI v. SHARIFFA SALMAH

[Appeal Board (Ahmad Ibrahim, President, M. J. Namazie and Mohamed Sidek bin Haji Abdul Hamid, Members) May 16, 1959]

[Singapore — Shariah Court Appeal No. 1 of 1959]

Muslim law — Marriage — "Wali mujbir" solemnizing virgin daughter's marriage without her consent — Daughter refusing to give consent to marriage — Whether marriage valid — Right of father under Shafi'i School of law — Question of "Kufu" discussed.

Muslims Ordinance, 1957, ss. 12, 19 and 21 — Powers of Shariah Court — Observations on procedure.

This was an appeal from the order of the Shariah Court declaring a marriage solemnised by the appellant between his daughter, the respondent and one Syed Idros to be void. The application to the Shariah Court was made by the father, the appellant, who gave evidence of the marriage which he solemnised as *"wali mujbir"* for his daughter and asked the Shariah Court to make an order that his daughter should accept the marriage as valid and go to live with her husband.

Held: (1) under the Shafi'i School of law where a virgin girl is given away in marriage by her father, her consent is not essential to the validity of the marriage and therefore the marriage in this case was valid;

(2) notwithstanding the provisions of section 12 of the Muslims Ordinance which requires the Register of Marriages to be signed by the husband and the wife as well as the *wali* of the woman and by the witnesses, section 19 provides in effect that nothing in that Ordinance shall be construed to render invalid merely by reason of its having not been registered any Muslim marriage which otherwise is valid, therefore although the marriage in this case was not registered, this does not affect the validity of the marriage.

SHARIAH COURT APPEAL.

The facts appear sufficiently from the judgment of the Board given by —

Ahmad Ibrahim P.: This is an appeal from the Order of the Shariah Court declaring a marriage solemnized by Syed Abdullah bin Hassan Al-Shatiri between his daughter, Shariffa Salmah, and one Syed Idros bin Saggaf Al-Jofri to be void.

At the conclusion of the hearing of the appeal we announced our decision to allow the appeal and to set aside the order of the Shariah Court and stated that we would give our reasons in writing later.

The application to the Shariah Court was made by the father, Syed Abdullah bin Hassan Al-Shatiri, who gave evidence of the marriage which he solemnized as *wali mujbir* for his daughter. He also called two witnesses who were present at the marriage ceremony and he asked the Shariah Court to make an order that his daughter, Shariffa Salmah, should accept the marriage as valid and go to live with her husband, Syed Idros bin Saggaf Al-Jofri. The first question that arises in this appeal is whether the Shariah Court has powers to make what is in effect a decree for the restoration of conjugal rights and consummation of the marriage. Section 21 of the Muslims Ordinance, 1957, gives the Shariah Court power to deal with proceedings which involve disputes relating to marriage, but the powers of the Shariah Court under this section are, in our opinion, confined merely to making a declaration as to the validity or otherwise of a marriage. The Shariah Court has power to make a declaratory order but this power should, in our opinion, be exercised with restraint, especially where, as in this case, there would clearly appear to be an alternative remedy for the applicant. The applicant, in this case, did approach a kathi to inquire whether the kathi would register the marriage. The applicant (or rather the husband in this case) could have been asked to apply to a kathi for the registration of the marriage and if the kathi refused to register the marriage, an appeal could have been brought to the Shariah Court. This course was not however pursued by the learned President of the Shariah Court. He proceeded to hear the applicant and his witnesses, and after hearing Shariffa Salmah, the daughter, he made a declaration that the marriage was invalid. It is significant that the husband, who was an interested party to the application, was not heard before the Court.

Before dealing with the merits of the appeal, we would like to point out the importance of the Shariah Court following certain accepted principles regarding the procedure of a trial and the hearing of witnesses. We have already expressed the opinion that the Shariah Court would not appear to have jurisdiction to hear the actual application made in this case and an amendment should have been made before the Court proceeded to hear it. It is also an accepted principle that a Court should ensure that all interested parties are before it before deciding any matter; in this case the husband was not a party to the proceedings before the Court and we would point out that the effect is that the order of the Shariah Court is for this reason defective and would certainly not be binding on the husband. The record of the case supplied

to us was so defective that we felt it necessary to write to the President to ask him to supply the notes of evidence recorded by him, the grounds of judgment and any exhibits filed in the case. We received a reply that the notes of evidence recorded were contained in the record of the case. On examination of this record it appears that no evidence was in fact recorded but merely a summary of the evidence and the arguments. There is nothing on the record to show whether an opportunity had been given for cross-examination of the evidence given, and there were a number of material points where no evidence was recorded. To mention but a few matters, there is nothing on the record to show what School of Muslim Law the parties belonged to, whether the daughter was a virgin or a *janda* at the time of the marriage, whether the relations between the father and daughter were friendly at a time of the marriage, and whether the person to whom the daughter was married was equal (*kufu*) with her. Before us the applicant produced two *fatwas*, given by the Dato Mufti of Johore, which he said were produced by him before the Shariah Court. The learned President said that no exhibits were filed in the case, but in view of the cursory manner in which the trial appear to have been conducted, we are forced to accept the statement of the applicant that the *fatwas* were handed to the Court but were for some reason which did not appear on the record summarily rejected by the learned President. The learned President informed us that there were no other grounds of decision other than that contained in the notes of evidence. We find, however, that the learned President did give his grounds of decision and that these were published (although without direct reference to the case) in the *Utusan Melayu* and the *Berita Harian*. We feel it our duty to deprecate the view of the learned President that he should supply the detailed grounds of his judgment to the newspapers but not to the Appeal Board.

In view of the clear deficiencies in the conduct of this case by the learned President we considered whether we should not send the case for retrial by the learned President. We felt, however, that as the matter had been so long delayed we should record the evidence ourselves and treat the appeal as a rehearing in fact. We do not wish, however, this step to be taken as a precedent. In the normal case, the Appeal Board should, we feel, act on the evidence recorded by the Shariah Court and should not, other than in exceptional circumstances, record evidence itself. We feel, however, that this is an exceptional case and that it was necessary before we could arrive at a decision on this appeal, to have further evidence in the matter. We therefore heard the evidence of the appellant and his witnesses, that of Shariffa Salmah, the daughter, and her witnesses and also of the man to whom the daughter was given in marriage, Syed Idros bin Syed Saggaf Al-Jofri. The material facts of the case were not in dispute and may be summarised as follows. The appellant, Syed Abdullah bin Hassan Al-Shatiri, is a teacher in the Aljunied Islamic School and he lives with his wife and family at quarters adjoining the school. He follows the Shafi'i School of Muslim Law. The daughter, Shariffa Salmah, had been friendly with a Malay, Abdul Razak, since 1956 and had met him and gone out with him on a number of occasions, without the knowledge of her parents. It appeared that some time in 1957, her mother saw her talking to Abdul Razak. The father, Syed Abdullah, who was informed of this, scolded the daughter and thereafter it appeared she was not allowed to go out alone and therefore had no opportunity of meeting Abdul Razak. Early in 1958, there were negotiations afoot for the marriage of the daughter, Shariffa Salmah, to Syed Idros bin Syed Saggaf Al-Jofri, who was related both to Syed Abdullah and his wife. The marriage negotiations had not been finally concluded and therefore Shariffa Salmah, we were told, was not consulted about the marriage. Shariffa Salmah herself said she did not know about the negotiations but it might be that she had some inkling of them. In any case on 30th August, 1958, she left her father's house and went to the house of Abdul Razak. She persuaded Abdul Razak to take her to the Police Station, which he did, and as a result the father was called. The father tried to persuade his daughter to return home but she refused and made it clear that she would not return home unless she was married to Abdul Razak. The evidence before us made it clear that there had been no enmity or difficulty between the father and the daughter. She was asked why she decided to leave her parents so suddenly and she said she wanted to marry Abdul Razak and realised that her father would not agree to the marriage. She had not told her parents of her plans and we ascertained that although Abdul Razak had suggested that he should get his family to negotiate for her hand in marriage, she had dissuaded him. After the father had

failed to persuade his daughter to return home, the Police made some attempt to help her to get married to Abdul Razak but the father refused to give his consent to the marriage and the marriage could not be solemnised. Eventually she was allowed to go to live with Abdul Razak and his family. In the meantime the father on 2nd September, 1958 as *wali mujbir* performed the marriage of his daughter to Syed Idros bin Saggaf Al-Jofri. No attempt was made by the father to obtain the consent of his daughter who according to the evidence was then a virgin and aged 19 years. After this marriage, the father approached the Chief Kathi to enquire whether he would register the marriage. The Chief Kathi sent for Shariffa Salmah and she was told about her marriage to Syed Idros bin Saggaf Al-Jofri. She refused to give her assent to the marriage and in fact strongly opposed it. The Chief Kathi therefore said that he could not register the marriage. The husband, Syed Idros bin Saggaf Al-Jofri, himself made no attempt to have the marriage registered, although the statutory duty in regard to registration of the marriage was on him. After this Abdul Razak and his family attempted to have a marriage between him and Shariffa Salmah performed by a kathi but without success. Shariffa Salmah continued to live with Abdul Razak and his family, and before us Shariffa Salmah and Abdul Razak admitted that they had sexual intercourse with each other about a month after she came to stay with him. The affair was at a stalemate until November 1958 when the Shariah Court was constituted and when the father made his application to the Shariah Court. The husband took no active interest in the matter and although he was present at the hearing in the Shariah Court, he took no part in the proceedings. The Shariah Court after hearing the application of the father made the order that the marriage was invalid and it is against this order that the father has appealed to this Board.

The learned President held that the marriage was invalid in reliance on the following two hadiths:—

(a) The Prophet said "Do not give in marriage, a woman who is not a virgin until you have obtained her authority to the marriage, and do not give in marriage a virgin until her permission has been sought" (*Sahih Al-Bukhari*);

(b) The Prophet said "One who is not a virgin has a greater right to her person than her guardian. A virgin's permission should be sought with regard to her person and silence on her part amounts to permission." (*Sahih Muslim*).

The learned President supports his stand by quoting two sayings of Imam Shafi'i to the effect first, that if a doctrine is based on a sound hadith, that is his doctrine and secondly, that if there is a conflict between his ruling and a sound hadith, then his ruling should be rejected. In this way the learned President has attempted to set aside all the learning on the rights of the *wali mujbir* contained in the writings of Imam Shafi'i himself and in the Shafi'i legal textbooks.

The parties to this appeal follow the Shafi'i School of law and consequently the principles laid by Imam Shafi'i, as set out and explained by the jurists of this school of law have to be construed and applied.

At the out-set it is clear that all the four Sunni Schools of law, as well as the Jaafari (Shiah) School of Law agree that a virgin who has not attained puberty can be given away in marriage by her guardian who is a *Wali Mujbir*. There is, however, no consensus of opinion in the case of a virgin who has attained puberty and the age of discretion.

The Shafi'i jurists agree that it is commendable on the part of a guardian to seek the consent of a virgin who has attained puberty to her marriage, but however, morally reprehensible the action of the guardian may be in not doing so, it does not follow that the marriage so contracted can be deemed to be invalid. The whole trend of Shafi'i juristic opinion is against this conclusion, and in support they cite a tradition of the Prophet that there is no (valid) marriage without a *wali*.

We do not agree with the learned President that the two hadiths quoted by him necessarily show that in the case of a virgin girl a marriage is invalid unless the girl has given her consent to it. We would quote on this point the views of the commentators on those hadiths. Al-Qastallani in his commentary on the *Sahih al-Bukhari* refers to the hadith in the *Sahih al-Bukhari* quoted by the learned President and says "There is a difference of opinion among the learned as to the meaning of the phrase 'ask the consent (*izin*) of the virgin'." The hadith has been used to support the argument that the father has no right of "*jabr*" or compulsion over his daughter, if she disagrees to the marriage, and this is the doctrine of the Hanafi School. Imam Malik, Imam Shafi'i and Imam Ahmad bin Hanbal however say that the father can give his virgin daughter in marriage and they rely on a hadith recorded by Al-Daraqutni which reads "The woman previously married has more

right as regards herself than her guardian and the virgin is given in marriage by her father." Again Al-Nawawi in his commentary on the *Sahih Muslim* refers to the hadith in the *Sahih Muslim* quoted by the learned President and says "There is a difference of opinion among the learned as to the meaning of the phrase 'ask the consent (*izin*) of the virgin'." Imam Shafi'i, Imam Abi Layla, Imam Ahmad and Imam Ishaq say that the hadith requires the consent of the virgin daughter to be asked for and if the *wali* is the father it is commendable (*sunnat*) that he should ask for the consent of his virgin daughter but if the father gives his virgin daughter in marriage without her consent the marriage is valid, because it is presumed that he would wish what is best for his daughter.

The view of the Shafi'i School is, in our view, well summarized in Nawawi's *Minhaj-et-Talibin* as follows:—

"A father can dispose as he pleases of the hand of his daughter, without asking her consent, whatever her age may be, provided she is still a virgin. It is however commendable to consult her as to her future husband; and her formal consent to the marriage is necessary if she has already lost her virginity. Where a father disposes of his daughter's hand during her minority, she cannot be delivered to the husband before she attains puberty. In default of the father, the father's father exercises all his powers. Loss of virginity puts an end to the right of disposing of a daughter's hand without her consent; and there is no difference in this respect between a loss caused by lawful cohabitation and one that is the consequence of unlawful intercourse. On the other hand, the right remains intact where the loss takes place without carnal connection, as for example in consequence of a fall upon the ground."

We considered the question whether the rule of the Shafi'i School of Muslim Law which enables a father to give away his virgin daughter in marriage even without her consent, is applicable in Singapore in view of the provision for the compulsory registration of marriages in the Muslim Ordinance, 1957. Section 12 of the Muslims Ordinance, 1957, requires the husband and the wife to attend within seven days of the marriage at the office of a kathi to effect the registration of the marriage and the rules under the Muslims Ordinance require the Register of Marriages to be signed by the husband and the wife as well as by the *wali* of the woman and by the witnesses. It would appear therefore that where a father gives away his daughter in marriage without her consent such a marriage cannot be registered, but section 19 of the Muslims Ordinance, 1957, provides in effect that nothing in the Ordinance shall be construed to render invalid merely by reason of its having not been registered any Muslim marriage which otherwise is valid. Therefore although the marriage in this case was not registered, this in our opinion does not affect the validity of the marriage.

Though the right of the father to give his daughter in marriage is theoretically an absolute right, in practice, there are numerous conditions attached to its exercise. In the first place the Shafi'i School of Law requires not only that the guardian (including the father) should be a male Muslim, adult and sane, but also that he should be just. This doctrine is based on a saying of the Prophet, to the effect that "A marriage is not valid, unless it is contracted by a *wali* who is *murshid.*" Imam Shafi'i interprets *"murshid"* in this hadith as requiring that the *wali* should be just. Again Syed Ameer Ali in his *Mohamedan Law,* Vol. 2, Page 237, states that "there seems to be a general consensus of opinion among all jurists that where the father has acted 'wickedly or carelessly' the marriage is invalid." Moreover, according to the Shafi'i School of Law a guardian can never give a woman in marriage to a man of inferior condition, except with her entire consent, and Imam Nawawi in the *Minhaj-et-Talibin* states that according to most authorities where a father disposes of the hand of her virgin daughter, whether minor or adult, in favour of a man of inferior condition, without obtaining her consent such a marriage is null and void.

In a book on the "Muhammedan Law of Inheritance, Marriage and the Rights of Women," Shaik Abdul Kadir bin Muhammed Al-Makkawi says:

"The impediments to guardianship are seven — (1) slavery; (2) childhood; (3) unsound mind; (4) legal disqualification or indiscretion, for instance, when one has attained puberty but not to the age of discretion or if after having reached the years of discretion he becomes extravagant, and then he was by law declared incompetent, for by his defect he cannot manage his own affairs and so he cannot manage the affairs of another; (5) bad moral character, because it is a defect which discredits the evidence of a witness and therefore it disqualifies for guardianship; (6) deranged judgment, through decrepitude or otherwise, such as idiocy, by reason of his inability to make enquiries about the condition of husbands and to know which is a proper match; (7) difference of religion, so a non-Muslim cannot become the guardian of a Muslim woman."

The author goes on to state that where the father or paternal grandfather gives a virgin in marriage without her consent the marriage will be valid on five conditions — (1) there should not be between her and her father or grandfather

who gives her in marriage any such manifest enmity as not to be hidden from the people of her locality; (2) the husband should be a match (*kufu*) for her; (3) the husband should be able to pay the *maskahwin;* (4) there should be no outward or inward enmity between her and the husband; (5) he should not give her in marriage for less than the proper dower in the currency of the country; if any of the said condition is wanting the contract becomes null and void.

The learned President in the course of his judgment as published in the *Utusan Melayu* and the *Berita Harian* seems to regard the matter of "*kafa'ah*" (equality) as one purely for the woman who is married and as being no concern of the guardian. This view is contrary to the view held by all the four Sunni Schools. *The Hedaya* summarises the law as follows (at p. 40):—

"In marriage regard is had to equality because the Prophet has commanded saying 'Take ye care none contract women in marriage but their proper guardians and that they be not so contracted but with their equals'; and also because the desirable ends of marriage such as cohabitation, society and friendship, cannot be completely enjoyed excepting by persons who are each other's equals (according to the customary estimation of equality) as a woman of high rank and family would abhor society and cohabitation with a mean man; it is requisite therefore that regard be had to equality with respect to the husband, that is to say, that the husband be the equal of his wife; but it is not necessary that the wife be the equal of the husband, since men are not degraded by cohabitation with women who are their inferiors. It is proper to observe, in this place, that the reason for attending to equality in marriage, is that regard is had to the circumstance in confirming a marriage and establishing its validity; for if a woman should match herself to a man who is her inferior, her guardians have a right to separate them, so as to remove the dishonour they might otherwise sustain by it."

In the *Kitab Al Um,* Imam Shafi'i refers to the argument that the doctrine of "*kafah*" was intended to protect the woman from contracting an untrue marriage but does not agree with it (*Kitab Al Um,* Vol. V, p. 13). The view of the Shafi'i School of Law is that the absence of equality (*kufu*) invalidates a marriage unless the marriage is solemnised with the consent of the woman and all the guardians. Nawawi in the *Minhaj-et-Talibin* sums up the Shafi'i Law as follows:—

"Where there are several persons who, by their degree of agnation, are equally competent as guardian, the consent of all is necessary to a misalliance, though it is only one of them that need preside at the celebration of the marriage. Agnates further removed can never oppose a misalliance concluded by one more nearly related, acting as guardian, with the full consent of the woman in question; but a misalliance concluded by one of the agnates entrusted with the guardianship, without the consent of the others equally competent is wholly illegal, even though the bride should give her consent."

There is no difference of opinion among the four Sunni Schools as regards the doctrine of *kafa'ah* (equality) though they do differ as regards the details of what constitutes equality. It is however unnecessary for the purposes of this appeal to go into these differences, as the question of *kafa'ah* does not arise in this case. We have only dealt with the question of the right of the guardian in relation to *kafa'ah* (equality), as the learned President has used his view that *kafa'ah* is a matter only for the woman to support his argument that the father has no right of *ijbar* (compulsion) over his virgin daughter, even if the man to whom he gives his daughter in marriage is her equal in all material respects.

Our conclusion applying the law, as expounded by the authorities of the Shafi'i School of Law which is applicable in this case, is that the marriage in this case was valid. We therefore set aside the order of the Shariah Court and substitute for it an order declaring the marriage to be valid. We felt however that it was unreal in the circumstances of this case to ask for the continuance of a marriage, to which the wife was clearly opposed. Shariffa Salmah gave evidence before us. She was respectful to her father and mother and did not appear to bear any ill-feelings towards them. She appeared however to have made up her mind in this matter. She insisted that she and not her father was responsible for her future life and it was clear that she was adamant in her resolve not to accept the marriage arranged for her by her father and to live with Abdul Razak. The husband, Syed Idros bin Saggaf Al-Jofri, as we have already said, did not appear to have taken an active interest in the matter. He said he wished to marry Shariffa Salmah but we could not help coming to the conclusion in this case that he agreed to be a party to the marriage on the persuasion of his uncle, Syed Abdullah bin Hassan Al-Shatiri, the father of the girl. As we have pointed out he took no active steps to have the marriage registered nor did he take any steps to assert his rights as a husband. It was clear that he had lost interest in the marriage and before us he said that in the circumstances he was prepared to release Shariffa Salmah from the marriage. We therefore arranged for the parties to see the Chief Kathi and at the request of Syed Idros bin Saggaf Al-Jofri and Shariffa Salmah a *fasah* divorce was arranged and regis-

tered. We might add that the father did not entirely agree to the termination of the marriage. His personality was as strong, if not stronger, than his daughter's and as we have said it was he who took an active part in attempting to get the marriage registered and in insisting on the validity of the marriage. We sympathised with and understood his feelings as a father but we felt that in this case the interests of the community as a whole should take precedence over the personal feelings of the father. We felt it was unreal to insist on the continuance of a marriage which could not be consummated and to make it impossible for the girl in this case, to marry the man she loved. We would have felt it our duty, if the husband had insisted on his rights in this case, to assist the wife to take steps to terminate the marriage but we were glad that the matter was resolved by the agreement of the husband to give his wife a *khula* divorce and in so doing in the words of the Holy Quran to "set her free with kindness" (*Surah* II Verse 231).

Appeal allowed.

Re CHOP TIN JUI PHONG

[O.Bk.J. (Hepworth J.) September 22, 1958]

[Malacca — In Bankruptcy No. 9 of 1958]

Bankruptcy — Notice — Final Judgment — Settled list of debtors — Whether constitutes final judgment against person whose name and amount of his debt appearing therein — Bankruptcy Ordinance (S.S. Cap. 45), ss. 3(1)(i) and 32.

The fact that a person's name and the amount of his debt appear among the settled list of persons indebted to a debtor under section 32 of the Bankruptcy Ordinance (S.S. Cap. 45) does not constitute it a final judgment within the meaning of section 3(1)(i) of the Ordinance.

The provisions of section 3(1)(i) of the Bankruptcy Ordinance must be strictly construed in favour of the debtor and ought not to be held applicable except in a case which is manifestly within the words of the clause.

Case referred to:

(1) *In re a Bankruptcy Notice* (1907) 1 K.B. 478.

BANKRUPTCY.

Joginder Singh (Asst. Official Assignee) for the Official Assignee.

Managing partner of the Chop in person.

Cur. Adv. Vult.

Hepworth J.: Section 3(1)(i) of the Bankruptcy Ordinance (Cap. 45) provides that it is an act of bankruptcy if a debtor fails to comply with a bankruptcy notice served on him by a creditor who has obtained a final judgment against him in respect of which execution has not been stayed. The Official Assignee in this case argues that by virtue of the provisions of section 32 of the Ordinance, where a person's name appears among a list of persons indebted to a debtor and such person and the amount of his debt are settled on such list in accordance with the provisions of that section, then the fact of such person and the amount of his debt being settled on such list constitutes a final judgment in respect of that debt for the purposes of section 3(1)(i) of the Ordinance because section 32(3) of the Ordinance provides that execution may issue against the debtor for the amount set opposite his name in such list in the same way as if judgment had been entered up against him for such amount in favour of the Official Assignee.

In *In re a Bankruptcy Notice,* (1) Vaughan Williams, L.J. stated "there are several authorities in which it has been laid down that section 4, sub-section (1)(g), of the Bankruptcy Act, 1883, ought to be construed strictly, and ought not to be held applicable except in a case which is manifestly within the words of the clause.' The provisions of section 3(1)(i) of the Bankruptcy Ordinance are substantially similar to the provisions of section 4(1)(g) of the Act and accordingly must be construed strictly. In that case a creditor had asked that a Bankruptcy Notice might be issued upon a judgment obtained in pursuance of an order purporting to be made under section 12 of the Arbitration Act, 1889. This section provided that "an award on a submission may by leave of the Court or a Judge be enforced in the same manner as a judgment or order to the same effect." It was held that all that was done by section 12 was to give to the successful party under the award the right to enforce it as if it were a judgment, and that such a case did not fall within section 4(1)(g) of the Act. Section 12 of the Act did not give power to turn such an award into a judgment. It gave to the award the same status as a judgment for the purpose of enforcement, but it left it what it was before, that is an award.

It seems to me that the intention and effect of section 32 of the Ordinance is similar to that of section 12 of the Arbitration Act, 1889. In the same way as the latter section merely gives to the award the same status as a judgment for the purpose of enforcement, but leaves it what